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September 3, 2002

Karen Getman, Chairman
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, California 95814

Re: Petition to Amend Regulation 18531.7

Dear Chairman Getman:

Thank you for agreeing to place the petition to amend regulation 18531.7 on the September 5, 2002, Commission agenda. I write to supplement my comments expressed in my letter of August 22, 2002, to Mark Krause on behalf of my clients the California Federation of Labor, AFL-CIO, the California State Council of Service Employees International Union and the California Teachers Association.

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The petition to amend addresses three issues:

1. Definition of member;

2. Member communication payments made "at the behest" of a candidate; and

3. Member communication payments made by an organization's sponsored PAC.

This letter will address each of those issues in turn.

Definition of Member

Although staff presented an alternative definition that was broader in application than the one ultimately adopted, it did not recommend that version. The Commission, while agreeing with staff, did suggest that if the option recommended by staff "did not reach those organizations the statute (was) intended to reach," it would encourage the public to let the Commission know. (Unapproved Minutes, FPPC Meeting of August 9, 2002, page 8)

The purpose of this letter is to advise the Commission that at least one segment of the public believes the definition of member is too narrow. As the regulation reads now there are essentially two ways to establish whether someone is a member:

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1) the person has a right to vote for the election of a director or directors or on a disposition of the assets of an organization or on a merger; or

2) the person has a right to vote on changes to the articles or bylaws.

Many membership organizations will not meet this definition. For example, the California Teachers Association, an organization with some 300,000 members, does not provide for direct election of directors or amendments to bylaws and articles by its members. Instead, it uses a delegate selection process whereby CTA members elect delegates who attend a conference at which the delegates select the directors and/or amend bylaws and articles. To suggest that the 300,000 teachers who belong to CTA are not "members" for purposes of section 85312 makes little sense–and is clearly contrary to any intended purpose of section 85312.

Moreover, the narrow definition of member casts in doubt the relationship between local unions of an international union, the international union and its intermediary units. Most local unions are affiliated with regional, state and national or international unions. However, members of a local union usually do not have the direct right to elect the directors of a regional or state unit of the same union. Instead, those local union members elect others who then meet and elect directors or amend bylaws/articles of the intermediate units.

In addition, many labor unions are affiliated with a federation of unions. The most common of these is the AFL-CIO. The AFL-CIO, while an international union, has state and regional components. The California Federation of Labor is the AFL-CIO state body. In addition, there are several dozen regional bodies within California known as central labor councils, which are all affiliated with the AFL-CIO. The current regulation suggests members of unions which are affiliated with these federations are not members of those federations even though they pay dues to and indirectly elect and control the activities of those federations.

In summary, the definition is too narrow. The suggested amendments to the regulation (attached to my letter of August 22, 2002) corrects this problem. I would note that much of the language in the proposed amendment is taken from the Federal Elections Commission definitions regarding interpretation of a similar exemption for member communications found in federal law.[1]

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[1] To a degree the staff's broader definition tracked the FEC regulation, although it omitted the "indirect" language found in the proposed amendment and did not contain the specific language regarding federation of unions.

While the staff memorandum did a good job of discussing the constitutional boundaries of associational rights, it did not point out the legal history involving the FEC's efforts to define member. That history includes successful litigation challenging an earlier and more narrow FEC definition of member. (*Chamber of Commerce v. FEC*, 69 F.3rd 600, D.C. Circuit 1995, amended on denial of rehearing 76 F.3rd 1234, D.C. Circuit 1996) In the *Chamber of Commerce* case, the Court of Appeals noted:

> The Supreme Court long ago . . . recognized an organization's–in that case a union's–First Amendment right to communicate with its "member" *United States v. CIO* (cite omitted). It is obvious that too restrictive a definition of member–as the Commission's here–would burden that right. We are obliged to construe the statute to avoid constitutional difficulties. . . .

As a result of the *Chamber of Commerce* litigation, the FEC adopted its current regulation which takes a more expansive approach than the one adopted by the FPPC. My clients believe their associational rights under the First Amendment as interpreted by the courts require the Commission to amend its current regulation to broaden the definition of member.[2]

Payments Made At the Behest of a Candidate

As I pointed out in my letter of August 22, 2002, section (e) of the regulation cannot be reconciled with the plain meaning of section 85312. The Commission's current regulations provide that "payments made at the behest" of a candidate are contributions. (FPPC Regulation 18215(a)(2)(A)). Section 85312 exempts member communications from the definition of "contribution." Yet regulation 18531.7 states just the opposite–payments for member communications made at the behest of a candidate are still contributions. This makes no sense.

Section 85312, although added by Proposition 34, has a history that predates that ballot measure. A similar section (also section 85312) was added by the voters in 1996 when they adopted Proposition 208. Although the Commission never adopted regulations interpreting the Proposition 208 section 85312, it did offer interpretations through numerous advice letters. Those letters never suggested that membership communication payments made at the behest of a

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[2] Apparently staff and others were concerned that a broader definition of "member" could include a commercial entity (e.g., Costco). For this reason a narrower definition was promoted. From a constitutional perspective, that seems difficult to justify. From a legislative intent perspective it seems even less justifiable, for as the staff notes, shareholders of for-profit corporations enjoy the same rights as a nonprofit membership organization. And, from a practical perspective, it seems least justifiable--the notion that Costco will mail to "members"its views on how to vote in an upcoming election (not knowing if those members are Democrats, Republicans or affiliated with some other party) seems most unlikely from a business viewpoint.

candidate some how fell outside of the statutory exemption. In fact, the letters suggest just the opposite.

For example, in the 1997 *Woosley* Advice Letter, the Commission addressed a question from LA List involving a mailing that asked persons to donate to particular candidates. The Commission, citing section 85312, noted that "if the mailing is made at the behest of the endorsed candidates and **includes addressees other than LA List members,** then the costs incurred by the LA List in making such a mailing would be considered an in-kind contribution to the endorsed candidates. . . ." (*Woosley Advice Letter, A-97-107,* emphasis added) See also, *Zakson Advice Letter, I-97-563* (local union sending out fund raising solicitation at the behest of a candidate cannot take advantage of section 85312 exemption if the mailing goes to persons other than members of the local union).

And, in an analogous situation involving a longstanding FPPC regulation exempting newsletters sent to members of an organization from the definition of contribution, the Commission advised "Costs in connection with a political communication sent by an organization as part of its regularly published newsletter which complies with the criteria set out in Regulation 18225(b)(4)(C) are not reportable expenditures or contributions, **even if the communications is made at the behest of a candidate or committee."** (*Van Winkle Advice Letter, A-90578,* emphasis added.)

In summary, past Commission advice letters regarding member communications do not conform to the current version of regulation 18531.7 interpreting section 85312. Adoption of my clients' proposed amendments would bring the regulation into conformity with the plain meaning of the statute and past Commission interpretations.

Member Communications Paid by an Organization's Sponsored PAC

The application of regulation 18531.7 to organizations which pay for member communications with sponsored political action committee funds is unclear. As noted in my letter of August 22, 2002, one plausible interpretation is simply that any payments made with sponsored committee funds must be reported by the sponsored committee on campaign statements, but such payments still qualify for the exemption under section 85312 (i.e., the payments are still not contributions subject to applicable limits or expenditures, but reportable). My clients have no objection to this if it is clear that the disclosure is limited to describing the payments as "member communications." The proposed amendments make this clear.

If the regulation is intended to take sponsored committee payments for member communications out of the exemption in section 85312, then my clients do have objections. First, nothing in section 85312 would support such an interpretation. The exemption applies to

communications to members of an organization. In the case of a sponsored committee of a labor union, the committee receives its funds from the members of the union. In effect, the committee is nothing more than another bank account into which it places member funds and out of which it makes contributions and expenditures. To treat one bank account of the union different from another is not logical.

In addition, past Commission advice would suggest there is no distinction to be drawn between an organization and an organization's sponsored committee for member communication purposes. In the above mentioned *Zakson* Advice Letter, the Commission responded to a request for an interpretation of the Proposition 208 section 85312 by a local union sponsored committee. The letter makes no distinction or reference to the fact it was a sponsored committee seeking application of the exemption.

Conclusion

On behalf of my clients I respectfully request that regulation 18531.7 be amended as reflected in the attachment to my letter of August 22, 2002. Thank you for your consideration.

Very truly yours,

OLSON, HAGEL & FISHBURN, LLP

LANCE H. OLSON

LHO:all

cc: Art Pulaski (AFL-CIO)
John Hein (CTA)
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